

VINCENT A. PEPPER
ROBERT F. CORAZZINI
PETER GUTMANN
JOHN F. GARZIGLIA
NEAL J. FRIEDMAN
ELLEN S. MANDELL
HOWARD J. BARR
LOUISE CYBULSKI *
L. CHARLES KELLER *
MICHAEL J. LEHMKUHL *

* NOT ADMITTED IN D.C.

PEPPER & CORAZZINI

L. L. P.

ATTORNEYS AT LAW
200 MONTGOMERY BUILDING
1776 K STREET, NORTHWEST
WASHINGTON, D. C. 20006

(202) 296-0600

DOCKET FILE COPY ORIGINAL

ROBERT L. SYMPSON

GREGG P. SKALL

E. THEODORE MALLYCK
OF COUNSEL

FREDERICK W. FORD
1909-1986

TELECOPIER (202) 296-5572
INTERNET PEP@COMMLAW.COM

December 19, 1994

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

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DEC 19 1994

Re: Alpha Express, Inc.
"Petition For Partial Reconsideration"
CC Docket No. 92-115

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Dear Mr. Caton:

Transmitted herewith on behalf of Alpha Express, Inc. ("Alpha") are the original plus three microfiche plus five paper copies of its "Petition For Partial Reconsideration" in CC Docket No. 92-115.

This material is respectfully directed to the attention of the Commission.

Should any questions arise concerning this matter, please contact this office directly.

Very truly yours,

Ellen S. Mandell

Ellen S. Mandell
Attorney for Alpha Express, Inc.

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Revision of Part 22 of)
the Commission's Rules)
Governing the Public)
Mobile Services)

CC Docket No. 92-115

To: The Commission)

PETITION FOR PARTIAL RECONSIDERATION

Ellen S. Mandell, Esquire
PEPPER & CORAZZINI, L.L.P.
200 Montgomery Building
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
(202) 296-0600

Attorney for
Alpha Express, Inc.

December 19, 1994

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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Attachment A: "Comments On Further Notice Of Proposed
Rulemaking" filed by Alpha Express, Inc. on June 20, 1994

SUMMARY

Alpha Express, Inc. ("Alpha") seeks reconsideration of those portions of the Report and Order in CC Docket No. 92-115 which (1) purport to reclassify as "pending applications" 931 MHz grants which are not final because of outstanding petitions for reconsideration or applications for review; and (2) would delegate to the Common Carrier Bureau absolute discretion to resolve such reconsideration or review proceedings under the existing 931 MHz processing rules, but permits the Bureau to perfunctorily withhold that exemption where the Bureau feels the existing rules cannot be employed because of their "ambiguous and confusing nature."

Although Alpha agrees that the revised 931 MHz band processing procedures should not be applied to 931 MHz band grants which are subject to reconsideration or review, it is Alpha's position that all litigation involving those non-final 931 MHz band grants should be resolved under the existing rules, and not just those to which the Bureau subjectively decides to apply the exemption. Alpha shows that (1) the Commission's failure to articulate a uniform standard to govern the resolution of outstanding 931 MHz litigation in all cases contravenes APA requirements and delegates excessive discretion to the Bureau; and (2) in any event, 931 MHz grants which are not final due to outstanding petitions for reconsideration or applications for review cannot under statute or the Commission's rules properly be reclassified as "pending applications".

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Revision of Part 22 of)	CC Docket No. 92-115
the Commission's Rules)	
Governing the Public)	
Mobile Services)	
)	
To: The Commission		

PETITION FOR PARTIAL RECONSIDERATION

Alpha Express, Inc. ("Alpha"), by its attorney and pursuant to Section 1.429 of the Commission's Rules, hereby petitions for partial reconsideration of the Commission's Report and Order, CC Docket No. 92-115, FCC 94-201, 59 FR 59502 (published November 17, 1994) (hereinafter "Report and Order").

In pertinent part, the Report and Order:

- retroactively revises the procedures for processing so-called "pending applications" for new non-nationwide Public Land Mobile Service ("PLMS") paging facilities in the 931 MHz band;
- purports to reclassify as "pending applications" 931 MHz grants which are not final because of outstanding petitions for reconsideration or applications for review; and
- delegates to the Common Carrier Bureau ("Bureau") absolute discretion to resolve such reconsideration or review proceedings under the existing 931 MHz processing rules, but permits the Bureau to perfunctorily withhold that exemption where the Bureau feels the existing rules cannot be employed because of their "ambiguous and confusing nature."

Alpha agrees that the revised 931 MHz band processing procedures should not be applied to 931 MHz band grants which are subject

to reconsideration or review^{1/}. However, Alpha disagrees that those grants should under any circumstances be considered "pending applications." Furthermore, even if those granted applications could properly be classified as "pending," Alpha respectfully submits that the exemption from retroactive application of the revised procedure should apply to all of those non-final 931 MHz band grants, and not just those to which the Bureau subjectively decides to apply the exemption.

In support hereof, the following is respectfully shown:

STANDING

1. Alpha is the licensee of a wide-area PLMS paging system subject to an outstanding reconsideration petition^{2/}. The outcome of that litigation may depend on whether the existing 931 MHz processing procedures or the revised procedures apply. Thus, the policy adopted in the instant proceeding will effect Alpha directly and substantially. Under the circumstances, Alpha is an interested party with standing to submit this petition for reconsideration.

^{1/}See Alpha's Comments On Further Notice Of Proposed Rulemaking, CC Docket No. 92-115, dated June 20, 1994 (copy attached hereto as Attachment A).

^{2/}Alpha is the licensee of a wide-area PLMS paging system on the frequency 931.9625 MHz in the New York City metropolitan area under the call signs KNKP608 and KNKP609. Alpha acquired its interest in the 931.9625 MHz system earlier this year in a pro forma assignment of license from Contact Communications, Inc., a company which had the same ownership and control as Alpha at the time of the pro forma assignment. For purposes of simplicity, Contact is referred to throughout this submission as Alpha.

BACKGROUND

2. By a Further Notice of Proposed Rulemaking ("FNPRM")^{3/}, issued some two years after the Commission commenced the instant proceeding to comprehensively rewrite the PLMS rules^{4/}, the Commission announced a proposal to radically revise its policy for processing non-nationwide PLMS paging applications in the 931 MHz band, after twelve years and thousands of grants pursuant to the present 931 MHz processing procedures^{5/}.

3. The FNPRM noted that some 931 MHz grants made under the existing rules have not become final due to the filing of petitions for reconsideration or applications for review. Many of these reconsideration and review proceedings were filed by rival applicants and/or carriers, and have been left to languish for many years^{6/}. The FNPRM proposed to finally dispose of the long-pending 931 MHz litigation, albeit by the following novel policy, to be instituted on a retroactive basis:

^{3/}Further Notice of Proposed Rule Making, 9 FCC Rcd 2596, 2598 (1994).

^{4/}Notice of Proposed Rulemaking, CC Docket No. 92-115, 7 FCC Rcd 3658 (1992) ("NPRM").

^{5/}First Report and Order, General Docket 80-183, 89 FCC 2d 1337 (1982).

^{6/}In Alpha's case, an unsuccessful competing applicant filed a reconsideration petition against Alpha's grants under call signs KNKP608 and KNKP609 in 1992. Alpha opposed the reconsideration petition on substantive and procedural grounds, and timely constructed the facilities. The applications underlying Alpha's grants were filed in 1988.

- All so-called "pending" 931 MHz "applications" -- including 931 MHz grants that are subject to petitions for reconsideration or applications for review -- would be required to be amended to specify a particular frequency^{7/};
- "Applicants" would be required to amend to a frequency that was available at the time the "application" was filed;
- Formal FCC Public Notice of the "applications," as amended to specify frequency, would be republished;
- New 931 MHz applications mutually exclusive with the amended "applications" could be filed during the 30-day period following the republication of Public Notice;
- Mutually exclusive initial applications would be resolved through auctions.

4. Alpha timely filed Comments in response to the FNPRM^{8/}. In pertinent part, Alpha objected (1) that retroactive application of the proposed procedure would be fundamentally unfair and a denial of due process; (2) that retroactive application of the proposed procedure would contravene constitutional prohibitions against dissimilar treatment of similarly situated applicants; (3) that application of the proposal to systems which have been granted, constructed, and placed in operation would contravene the public interest in continuity of service; and (4) that the proposal is an uncon-

^{7/}Under existing Rule Section 22.502(p)(2)(i), 47 C.F.R. §22.501(p)(2)(i), an applicant for a new non-nationwide 931 MHz paging system may specify a "frequency preference," but Bureau staff makes the ultimate frequency assignment and is not bound by the applicant's expressed preference.

^{8/}Alpha's Comments are incorporated herein by reference. A complete copy is attached hereto as Attachment A.

stitutional "bill of attainder" with respect to Alpha's previously licensed 931.9625 MHz paging system.

5. The Report and Order adopts the general pattern for processing 931 MHz paging applications proposed in the FNPRM -- but with pertinent exception. The Commission acknowledged commentors' objections to retroactive application of the revised rules (and auction process) to resolve outstanding petitions for reconsideration and applications for review of 931 MHz grants, and thus agreed that these cases should be decided under the existing rules -- albeit, "to the extent possible."^{2/} In this regard, the Commission stated, remarkably:

... Because of the ambiguous and confusing nature of our existing rules and related practice and precedent, however, it may not be possible to resolve some of these cases under the existing rules. In such cases, we see no alternative but to return the applications, even if initially granted, to pending status on the grounds that granting, denying, or dismissing applications pursuant to such ambiguous and confusing rules could only lead to reversal, regardless of what action we take. In this more limited category of cases, we will process the pending applications under the new rules.

To effectuate this procedure, we instruct the Chief, Common Carrier Bureau, to act on all pending petitions for reconsideration of 931 MHz paging applications prior to the effective date of the new rules. Similarly, the Chief, Common Carrier Bureau, is instructed to prepare for Commission action the proposed resolution of any such pending applications for review so that they can be acted upon by the Commission

^{2/}Underlining added.

prior to the effective date of the new rules. 171/ To the extent they cannot, because of the ambiguity and confusion of the rules and associated practice and precedent, the applications, whether previously granted, denied, or dismissed, should be returned to pending status. ...

171/ The rules adopted in this Report and Order take effect on January 1, 1995. If the Commission or the Bureau have not acted upon the pleadings described above by the date that the rules adopted herein are effective, we shall stay the effect of new Section 22.541 of our rules on 931 MHz applications and also stay the special one-time filing procedure for all pending applications until the Commission or the Bureau have issued any necessary orders dealing with those pleadings.

Report and Order at ¶¶98-99. Although the January 1, 1995 effective date of the rules is now just days away, no orders have been issued pursuant to the above-quoted policy to date.

ARGUMENT

- A. The Commission has failed to establish an objective, uniform standard to determine whether outstanding 931 MHz litigation should be resolved under existing or revised procedures.

6. It is a basic tenet of administrative law that an agency must articulate the standards and principles governing its discretionary decisions, to ensure that its rules are applied in a fair and consistent manner. See e.g. Davis, Administrative Law Treatise, §8.1 et seq. (1979). Standards must be adequate to guide the agency in exercising its power, and must also be sufficient to enable affected parties to know their rights and obligations. See generally Information Providers' Coalition For Defense of The First

Amendment v. FCC, 928 F.2d 866, 875 (9th Cir. 1991) (acknowledging "the traditional argument that standards should be clear enough ... [to] curb the danger of arbitrary or discriminatory enforcement"). In addition, standards must be applied even-handedly, and not just to the benefit of a favored few. Northeast Cellular Telephone Company v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990)^{10/}. Although it is within the authority of an agency to create classifications of applicants, it is axiomatic that the agency must develop and articulate standards distinguishing between the classes, to ensure that the classification process "is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits" Morton v. Ruiz, 415 U.S. 199, 94 S.Ct. 1055, 1072 (1974).

7. In its bellwether Morton v. Ruiz decision, the Supreme Court of the United States stated succinctly the rationale underlying the requirement for an agency to confine and control exercise of discretion through clear enunciation of uniform standards:

The Administrative Procedure Act was adopted to provide, inter alia, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations."

^{10/}In Northeast Cellular Telephone Company, the Court vacated the Commission's grant of a waiver of the cellular rules, where the Commission had failed to articulate and consistently apply its waiver policy, quoting Airmark Corp. v. FCC, 758 F.2d 685 (D.C. Cir. 1985) ("if all five factors must be met by one petitioner, then all five factors must be met by the next").

Morton v. Ruiz, supra, 94 S.Ct. at 1073. Indeed, Section 706(2)(A) of the Administrative Procedure Act ("APA"), 5 U.S.C. §706(2)(A), condemns as unlawful agency actions which are "arbitrary, capricious," or "an abuse of discretion."

8. In contradistinction, the policy enunciated in the Report and Order, which directs the Bureau to resolve outstanding challenges to 931 MHz grants under the existing rules rather than the revised rules except "to the extent they cannot, because of the ambiguity and confusion of the rules and associated practice and precedent," falls far short of the APA and Supreme Court's minimum requirements. Rather than articulating uniform standards to govern the resolution of outstanding 931 MHz litigation in all cases, the Report and Order has delegated to the Bureau absolute discretion to choose, on a case-by-case basis, between resolving 931 MHz litigation under either the existing rules or the revised procedure, guided only by subjective staff judgments as to "ambiguity" and "confusion^{11/}." As a result, in any particular case, the choice of whether to resolve the matter pursuant to the existing rules or the revised procedures will be truly arbitrary, left utterly to the

^{11/}Throughout the Report and Order, the Commission repeatedly and conclusorily describes its existing 931 MHz processing rules and related practice and precedent as "ambiguous" and "confusing," but neither explains why these rules, etc. are "ambiguous" and "confusing" nor even identifies the specific rules, etc. which are "ambiguous" and "confusing." Nor does the Commission attempt to reconcile with its present view, its prior grant of thousands of 931 MHz applications under the existing rules, etc. over the course of a dozen years. Certainly the Commission does not appear to intend to call into question the validity of every one of those prior 931 MHz grants.

whim and caprice of the processing staff. The unfettered discretion which the Report and Order has vested in Bureau staff all but invites abuse.

9. Furthermore, constitutional principals of equal protection and court precedent prohibit such a plan, to subject contemporaneously pending 931 MHz applications to different regulatory schemes, based solely on subjective staff judgments as to "ambiguity" and "confusion." U.S. Const., Amend. V; Melody Music, Inc. v. FCC, 345 F.2d 730, 733 (D.C. Cir. 1965). See also New Orleans Channel 20, Inc. v. FCC, 830 F.2d 361 (D.C. Cir. 1987) (recognizing "the importance of treating parties alike when they participate in the same event or when the agency vacillates without reason in its application of a statute or the implementing regulations"); Public Media Center v. FCC, 587 F.2d 1322, 1331 (D.C. Cir. 1978).

10. Although the Commission expresses a concern that:

... granting, denying, or dismissing applications pursuant to such ambiguous and confusing rules could only lead to reversal, regardless of what action we take ...

fear of judicial review is not a proper basis to sacrifice reasoned decision-making. To the contrary, it is the position of the United States Court of Appeals for the District of Columbia Circuit that:

Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible.

Environmental Defense Fund v. Ruckelshaus, 439 F. 2d 584, 598 (D.C. Cir. 1971).

11. The Commission should thus avail itself of the opportunity presented on reconsideration to articulate that all outstanding 931 MHz reconsideration and review proceedings will be resolved in accordance with the existing rules. Alternatively, in the very least, the Commission must enunciate an objective, uniform legal standard, which will clarify the circumstances under which outstanding 931 MHz litigation will not be resolved under the existing rules, to ensure that all affected applicants are accorded fair treatment and equal protection.

B. 931 MHz grants which are not final due to outstanding petitions for reconsideration or applications for review cannot properly be deemed "pending applications."

12. In any event, the Commission cannot, consistent with its rules and its statutory mandate, properly reclassify as "pending" those 931 MHz applications that have been granted but are not final because of outstanding petitions for reconsideration or applications for review.

13. Rule Section 1.103(a) of the Commission's rules, 47 C.F.R. 1.103(a), and interpretive case precedent, Christian Broadcasting of the Midlands, Inc., 2 FCC Rcd 6404, 6404-5 (1987), make clear that grants are effective upon publication of public notice of such action, notwithstanding lack of finality. Beyond the 40-day period for the Commission to rescind such grants on its own motion, Rule Section 1.117, the Commission may not summarily set aside grants

which have not become final because of requests for reconsideration or review, absent the statutorily-required adjudication on the merits. Rather, Section 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. §405(a), requires the Commission, upon full consideration of the matter, to issue "an order, with a concise statement of the reasons therefor".

14. Furthermore, a primary obligation within the Commission's public interest mandate under Section 309 of the Communications Act, 47 U.S.C. §309, particularly in the PLMS context, is to ensure continuity of service to the public. La Star Cellular Telephone Co., 4 FCC Rcd 3777, 3780 (1989) (recognizing the "severe and immediate impact" on the public where the Commission administratively imposes replacement of existing cellular service with a different carrier). Alpha and other of the 931 MHz licensees subject to reconsideration and review, upon reasoned evaluation of the merits of the outstanding legal proceedings, have, during the long-pendency of such proceedings^{12/}, constructed and placed in operation their authorized systems, in furtherance of the public interest. Indeed, the Commission's rules and precedent clearly require PLMS stations to be constructed within 1-year of authorization, Rule Section 22.43(a)(2)^{13/}, and this policy is strictly enforced. T-Com, Inc., 5 FCC Rcd 6691, 6693 (1990) ("Those [PLMS permittees] who violate

^{12/}For example, as noted above, Alpha filed the applications underlying its non-final grants in 1988.

^{13/}47 C.F.R. 22.43(a)(2).

these [construction and notification] requirements do so at great risk to the continuation of their authorizations."). It is the customers of these systems who will ultimately suffer, by losing their current paging service, if, under the revised procedures, existing system licenses are summarily reassigned to "mutually exclusive" applicants in the auction process. Such a result cannot be reconciled with the Commission's statutory public interest mandate, or the statutory mandate requiring reasoned agency decisions.

CONCLUSION

15. Although the Commission is correct that outstanding 931 MHz reconsideration and review proceedings should be resolved under the existing 931 MHz processing rules rather than under the revised processing procedures otherwise adopted in the Report and Order, the Commission's plan to do so only "to the extent possible" cannot be implemented consistent with constitutional principles of equal protection and procedural statutes requiring enunciation of uniform standards to curb excessive agency discretion. To allow Bureau staff to freely and subjectively select among a menu of possible regulatory schemes, on a case-by-case basis, will result in impermissibly dissimilar treatment of applicants, and invites action which is arbitrary, capricious and an abuse of discretion. Moreover, the Commission has failed to explain its conclusory statement that its existing rules, policy and precedent are so "ambiguous" and "confusing" as to make it possible to resolve only some, but not

all, of the outstanding 931 MHz litigation under the existing procedures. In any event, the Commission cannot, consistent with its own rules and statutory mandate, properly return summarily to pending status (and refer for disposition by auction), those 931 MHz grants that are not final because of outstanding petitions for reconsideration or applications for review.

WHEREFORE, the premises considered, Alpha Express, Inc. respectfully submits that the Commission should reconsider its Report and Order to the extent requested herein.

Respectfully submitted,

ALPHA EXPRESS, INC.

By



Ellen S. Mandell
Its Attorney

PEPPER & CORASSINI, L.L.P.
200 Montgomery Building
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
(202) 296-0600

December 19, 1994

ATTACHMENT A

VINCENT A. PEPPER
ROBERT F. CORAZZINI
PETER GUTHMAN
JOHN F. GARZIGLIA
NEAL J. FRIEDMAN
ELLEN S. MANDELL
HOWARD J. BARR
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ATTORNEYS AT LAW
200 MONTGOMERY BUILDING
1776 K STREET, NORTHWEST
WASHINGTON, D.C. 20006
(202) 296-0600

ROBERT LEWIS THOMPSON
GREGG P. SKALL
E. THEODORE MALLYCK
OF COUNSEL
FREDERICK W. FORD
1909-1986
TELECOPIER (202) 296-5572

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JUN 20 1994

Mr. William F. Caton
Acting Secretary
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Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: Alpha Express, Inc.
"Comments On Further Notice Of Proposed Rulemaking"
CC Docket No. 92-115

Dear Mr. Caton:

Transmitted herewith on behalf of Alpha Express, Inc. ("Alpha") are the original plus three microfiche plus five paper copies of its "Comments On Further Notice Of Proposed Rulemaking" in CC Docket No. 92-115.

This material is respectfully directed to the attention of the Commission.

Should any questions arise concerning this matter, please contact this office directly.

Very truly yours,



Ellen S. Mandell
Attorney for Alpha Express, Inc.

Enclosure

Before the
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To: The Commission		

COMMENTS ON FURTHER NOTICE OF PROPOSED RULEMAKING

Ellen S. Mandell, Esquire
PEPPER & CORAZZINI, L.L.P.
200 Montgomery Building
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
(202) 296-0600

Attorney for
Alpha Express, Inc.

June 20, 1994

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SUMMARY

Alpha Express, Inc. ("Alpha") opposes that portion of the Further Notice of Proposed Rulemaking in CC Docket No. 92-115 which proposes to retroactively apply revised processing procedures for 931 MHz paging systems to "pending applications" and to "applications that have been granted, denied or dismissed and are the subject of petitions for reconsideration or applications for review."

The Commission has proposed a processing change whereby:

- All pending 931 MHz applications, plus all 931 MHz applications that have been granted, denied or dismissed and are the subject of petitions for reconsideration or applications for review, would be required to be amended to specify a particular frequency;
- Applicants would be required to amend to a frequency that was available at the time the "application" was filed;
- Formal FCC Public Notice of the "applications," as amended to specify frequency, would be republished;
- New 931 MHz applications mutually exclusive with the amended "applications" could be filed during the 30-day period following the republication of Public Notice;
- Mutual exclusivity would be resolved through competitive bidding or lotteries.

The pending applications have already been on cut-off lists, and it would be unfair to again expose the applications to mutually exclusive applications. The proposed rule change will operate as an ex post facto law with respect to applications that were granted but are subject to reconsideration or review, by jeopardizing the licenses without a final adjudication of the outstanding legal challenges.

Retroactive application of the proposed rule change also would be contrary to the public interest in continuity of communications service, if the licenses for systems which are subject to reconsideration or review are lost to mutually exclusive applicants.

The Commission's description of the proposed rule change, peculiarly and narrowly worded to apply not to all non-final grants in the 931 MHz band, but rather, only to grants which "are the subject of petitions for reconsideration or applications for review," will result in disparate treatment of applicants that were in the same lottery group, in violation of the Fifth Amendment and Melody Music, Inc. v. FCC.

The narrow wording of the proposed rule change bears indicia of an unconstitutional bill of attainder.

The Commission's desire for administrative expedience does not outweigh the potential unfairness of the rule. In any event, it is difficult to comprehend how the Commission's plan to invite additional mutually exclusive applications will alleviate the existing 931 MHz band processing backlog.

Alpha suggests that the rule change should be promulgated prospectively. Pending applications which are not mutually exclusive and not subject to petitions should be acted on immediately. Mutually exclusive applicants and protested applicants should be encouraged to voluntarily dismiss their applications to relieve processing gluts, by such incentives as tax certificates.

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Mobile Services)	
)	
To: The Commission		

COMMENTS ON FURTHER NOTICE OF PROPOSED RULEMAKING

Alpha Express, Inc. ("Alpha"), by its attorney and pursuant to Section 1.415(a) of the Commission's Rules, hereby submits comments in opposition to that portion of the Further Notice of Proposed Rulemaking ("FNPRM") in the above-referenced proceeding which proposes to retroactively apply revised processing procedures for 931 MHz paging systems to "pending applications" and to "applications that have been granted, denied or dismissed and are the subject of petitions for reconsideration or applications for review."^{1/} Alpha will show (1) that retroactive application of the proposed procedure would be fundamentally unfair and a denial of due process; (2) that retroactive application of the proposed procedure would contravene constitutional prohibitions against dissimilar treatment of similarly situated applicants; (3) that application of the proposal to systems which have been granted, constructed, and placed in operation would contravene the public interest in continuity of service; (4) that the proposal is an unconstitutional "bill of attainder" with respect to Alpha's previously licensed 931.9625 MHz paging system; and (5) the

^{1/}FNPRM, para. 15.

proposal will produce a swell of new mutually exclusive 931 MHz filings and increase the volume of 931 MHz litigation. Alpha suggests that alternatively, the Commission should promulgate on a prospective basis its proposed rule requiring 931 MHz applications to be frequency specific, and offer incentives to pending applicants to voluntarily dismiss their applications to alleviate the existing processing glut.

STANDING AND BACKGROUND

1. Alpha is the licensee of a wide-area Public Land Mobile Service ("PLMS") paging system on the frequency 931.9625 MHz in the New York City metropolitan area under the call signs KNKP608 (Glen Oaks (Queens), New York) and KNKP609 (Tracy Towers (Bronx), New York). Alpha also is an applicant for geographic expansion of its existing 931.9625 MHz system. Alpha acquired its interest in the 931.9625 MHz system earlier this year in a pro forma assignment of license from Contact Communications, Inc., a company which had the same ownership and control as Alpha at the time of the pro forma assignment. For purposes of simplicity, Contact is referred to throughout this submission as Alpha.

2. Alpha originally filed the applications underlying its 931.9625 MHz grants nearly six years ago, in August 1988. In the summer of 1989, the applications were consolidated for lottery with four mutually exclusive applications in Lottery No. PMS-31. Years of litigation followed the PMS-31 lottery. Public Mobile Services Lottery No. PMS-31, 5 FCC Rcd 7430 (Com. Car. Bur. 1990), app. for review., petition for recon. pending.

3. In 1992, pursuant to a settlement negotiated by the Chief, Mobile Services Division ("MSD"), Alpha was granted the frequency 931.9625 MHz at Glen Oaks and Tracy Towers. Letter from the Chief, Mobile Services Division, "Re: Settlement of New York 900 MHz Proceeding, Lottery No. PMS-31, and Related Applications," dated June 24, 1992 (Ref. 63500-DHS) ("June 24 Letter"). By that letter, the MSD also granted additional 931 MHz applications for the New York metropolitan area, some of which had been filed long after Lottery No. PMS-31, but which had become entangled in the PMS-31 litigation.

4. None of the grants made by the June 24 Letter became final. The Letter stated, in pertinent part:

The 900 MHz frequency assignments we are ordering are subject to all new or modified grants made herein becoming final.

Petitions for reconsideration were filed by third parties against certain of the grants, including Alpha's grant. Thus, as finality of any of the grants made by the June 24 Letter could not occur until finality of all grants made pursuant thereto, the petitions for reconsideration against certain of the grants precluded any of the grants from becoming final.

5. Within days of FCC Public Notice of the 931.9625 MHz grants to Alpha, Alpha constructed the stations and filed Form 489 Notifications of Completion of Construction. Licenses were then issued to Alpha's new stations^{2/}. In addition, to improve

^{2/}The original call sign for Alpha's 931.9625 MHz stations was KNKO425.